No. 13,673

United States Court of Appeals

For the Ninth Circuit

INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION (CIO) and INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, LOCAL 8,

Appellants,

vs.

HAWAIIAN PINEAPPLE COMPANY, LTD., a corporation,

Appellee.

HAWAIIAN PINEAPPLE COMPANY, LTD., a corporation,

Appellant,

vs.

MARTEN E. ADEN, et al.,

Appellees.

APPELLANTS' PETITION FOR A REHEARING.

GLADSTEIN, ANDERSEN, LEONARD & SIBBETT,
240 Montgomery Street, San Francisco 4, California,
Attorneys for Appellants and Petitioners.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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To the Honorable William Healy, Homer T. Bone and Richard H. Chambers, Judges of the United States Court of Appeals for the Ninth Circuit:

Come now International Longshoremen's and Warehousemen's Union and International Longshoremen's and Warehousemen's Union, Local 8, appellants here-

in, and file this their petition for rehearing in the above-entitled cause.

I.

THE AGENCY QUESTION.

This Court's opinion on this phase of the case begs the issue. It is not enough to say that a union is responsible ". . . if [it] puts or lets an officer or other representative get into a position where he can and does cause trouble . . ." (Slip Opinion p. 7). The issue is, who should have decided whether the union placed Meehan, Gettings, Bodine and Schmidt in such a position, or, indeed, if any of them occupied such a position—the jury or the trial court?

Our complaint was not, as this Court seems to think, that the trial court failed to give "long instructions" (Slip Opinion p. 7), but rather that it gave one (quite short) peremptory instruction which, despite substantial conflicts in the evidence (at least as to Meehan, Bodine and Schmidt) decided a basic factual issue adversely to the unions. It was our contention that by this peremptory instruction the trial court prevented the jury from deciding a fact issue which should have been submitted to it.

Nowhere does this Court in its opinion recognize that this is our contention. It is not surprising therefore that nowhere in its opinion does this Court meet the contention. We stated our position as simply as

we knew how at page 26 of our reply brief, to which once again we respectfully refer this Court.

II.

THE INCONSISTENCY OF THE VERDICTS.

If this Court failed to recognize the issue we sought to pose with respect to the agency question, the same cannot be said of the argument we made regarding the inconsistency of the verdicts. The opinion shows that this Court indubitably did recognize the argument; however, it equally shows that this Court failed to completely meet the argument. This Court prefaces its discussion of the point by saying "... it does seem a little difficult to understand why the jury found International and Local liable and did not also hold some of the leaders responsible." The Court then seeks to resolve this "little" difficulty by suggesting that the jury "may have thought" of one of four or five different theories which might have conceivably, perhaps, justified its verdicts. Of course, none of these theories, which are so carefully spelled out in this Court's opinion, were advanced on the trial, and none of them corresponded to anything submitted to the jury in the trial court's charge. Such *ex post facto* rationalization by an appellate court is not a satisfactory answer to a contention that the jury, without proper guidance, acted inconsistently and irrationally.

The state of this Court's thinking on this problem is reflected not only in its speculation as to the exist-

ence of "possible combinations of facts . . . which would make the verdicts consistent" (Slip Opinion p. 11),[1] but more clearly appears in the concluding sentences of the opinion.[2]

> ". . . there was probably an inconsistency in the verdict; but, as we have held, it is a case where the jury had a right to be inconsistent. But finally we cannot say there was any inconsistency." (Slip Opinion p. 14.)

Yes, no, maybe; but anyway the judgment is affirmed!

III.

THE ELEMENTS OF A TAFT-HARTLEY VIOLATION.

Except for two passing references in its opinion, this Court contents itself in disposing of our points here with the observation that "specifications of errors not mentioned . . . have [been] examined and found without merit" (Slip Opinion p. 11). We respectfully suggest that there is sufficient merit in any one of the following points to require at least some comment from the Court:

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[1]The statement immediately following ("Also we are sure an additional quantum of proof was required as to the officials of the International and Local who were actually named as defendants than as against the Unions" [Slip Opinion p. 11]) finds no support whatsoever in the record: either in the evidence or in the argument or in the charge. If we may put a rhetorical (and respectful) question to the Court: *What* is the additional quantum of proof required as to the officials which was not required as to the unions?

[2]That the Court recurs to this point some pages after it had presumably laid it to rest indicates that it is bothersome, like a toothache that one cannot quite ignore.

1. There was legitimate primary activity at The Dalles.

2. It was error to prevent the unions from establishing that Pineapple was an *alter ego* of the struck Hawaiian corporations.[3]

3. The instructions on secondary boycott were confusing, inconsistent and ambiguous and therefore erroneous.[4]

4. Other instructions, *e.g.,* that the railroad was a "person" within the meaning of the Act, are clearly erroneous.

5. The evidence was overwhelming that Pineapple's business was not interfered with by reason of union activity but because other companies for reasons of their own did not want to or, because of lack of equipment, could not engage in business with Pineapple.

The Court recognizes that in this case new legal fields are being explored.[5] That being so, a full and

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[3]This Court's statement that this contention "does not seem to have been proved to the point of any jury question" (Slip Opinion p. 6) overlooks the fact that the trial court by its rulings excluded the proof which was offered on this very issue.

[4]This Court's total failure to discuss this issue should be compared with the careful handling of the problem found in a recent opinion of the Second Circuit (*Douds v. International Longshoremen's Association,* 224 F.2d 455).

[5]"Surprisingly, there is little case law yet on the agency feature of the section" (Slip Opinion p. 7).

"[The instructions] have avoided well the pitfalls that one might expect in a new field" (Slip Opinion p. 11).

"At the time the case was in the District Court, *United Construction Workers v. Laburnum Construction,* 347 U.S. 656, and other cases, had not been decided" (Slip Opinion pp. 11-12).

comprehensive discussion of the points just mentioned, which were thoroughly briefed and argued by all parties, should have been contained in the Court's opinion.

IV.

MITIGATION OF DAMAGES.

This Court recognizes that the arguments advanced by the unions on this point "are quite convincing", but refuses to accept them because the jury "may have thought" that Pineapple wished to hold on to its trade or because Pineapple "may have reasonably thought" its troubles would soon be over (Slip Opinion, pp. 8-9).

Here again the Court speculates to support the jury's verdict. There was nothing in the evidence or the charge which justifies such speculation. And while an appellate court will properly go far to uphold a jury's verdict, we submit that it cannot go so far as to find itself outside the record of the case.

CONCLUSION.

Although the Court disclaims the notion that the evidence relating to violence motivated its decision, it seems obvious to us that this was the case. Throughout the opinion are constant references to this factor

which concededly is irrelevant when one seeks "the proper answer to legal questions" (Slip Opinion p. 13). The constant iteration and reiteration of this factor clouded the eyes of the jury and the trial court, and we respectfully submit, of this Court as well. Absent that element, we are confident that this Court would not permit the judgment against the unions to stand.

Of course, compounding the evil is the fact that there is no showing that the unions or any of their representatives were responsible for the violence (cf. *United Construction Workers v. Haislip Baking Co.*, 223 F.2d 872, 879). On the contrary, the record is clear that what precipitated the riot was the unplanned, unpremeditated outburst led by persons who might just as well (for all the record shows) have been provocateurs as responsible union members.[6]

To correct this manifest injustice, we are petitioning for a rehearing of this entire case and, since many of the issues are indeed novel, we respectfully pray that this petition be heard by the Court *en banc*.

Dated, San Francisco, California,
December 14, 1955.

Respectfully submitted,
GLADSTEIN, ANDERSEN, LEONARD & SIBBETT,
By NORMAN LEONARD,
Attorneys for Appellants
and Petitioners.

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[6]Cf. Tr. 598; 630-633.

CERTIFICATE OF COUNSEL

I hereby certify that I am of counsel for appellants and petitioners in the above-entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition for a rehearing is not interposed for delay.

Dated, San Francisco, California,
December 14, 1955.

NORMAN LEONARD,
Of Counsel for Appellants and Petitioners.